

**REMARKS**

Claims 1-20 and 39-56 are pending.

Claims 1-20 are allowed

Claims 39-56 stand rejected.

Claim 54 has been canceled, without prejudice.

Claims 39-53, 55 and 56 have been amended. Support for these amendments can be found throughout the specification and drawings, as originally filed.

This response is submitted in response to a Final Office Action and is deemed to place the application in a condition for allowance, or alternatively, in better condition for appeal.

The Applicants wish to express their appreciation to the Examiner for the courtesies extended to the Applicants' attorney, Preston Smirman, during a telephonic interview held on September 11, 2006. As a result of the interview, it was established that: claims 1-20 and 39-56 are pending, as opposed to claims 1-25; and that claims 39-56 are rejected, as opposed to claims 39-55. Furthermore, it was established that: (1) claims 39-41, 43-51 and 54-55 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,704,828 to Kemp in view of U.S. Patent No. 6,773,206 to Bradley et al.; (2) Claim 52 stands rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,704,828 to Kemp in view of U.S. Patent No. 6,773,206 to Bradley et al. and further in view of U.S. Patent No. 6,484,455 to Poole; (3) Claim 53 stands rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,704,828 to Kemp in view of U.S. Patent No. 6,773,206 to Bradley et al. and further in view of U.S. Patent No. 6,484,451 to Gavin; and (4) Claims 42 and 56

stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,704,828 to Kemp in view of U.S. Patent No. 6,773,206 to Bradley et al. as applied to claims 39 and 51, respectively, and further in view of U.S. Patent No. 6,484,455 to Poole.

### **35 USC §103(a) REJECTION**

Claims 39-41, 43-51, 54 and 55 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Kemp (U.S. Pat. No. 4,704,828) in view of Bradley et al. (U.S. Pat. No. 6,773,206).

The Applicants respectfully traverse the 35 U.S.C. §103(a) rejection of claims 39-41, 43-51 and 54-55. Claim 54 has been canceled, without prejudice, and the subject matter thereof substantially incorporated into independent claim 51.

The standard for obviousness is that there must be some suggestion, either in the reference or in the relevant art, of how to modify what is disclosed to arrive at the claimed invention. In addition, "[s]omething in the prior art as a whole must suggest the desirability and, thus, the obviousness, of making" the modification to the art suggested by the Examiner. *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1051, 5 U.S.P.Q.2d (BNA) 1434, 1438 (Fed. Cir.), cert. denied, 488 U.S. 825 (1988). Although the Examiner may suggest the teachings of a primary reference could be modified to arrive at the claimed subject matter, the modification is not obvious unless the prior art also suggests the desirability of such modification. *In re Laskowski*, 871 F.2d 115, 117, 10 U.S.P.Q.2d (BNA) 1397, 1398 (Fed. Cir.1989). There must be a teaching in the prior art for the proposed combination or modification to be proper. *In re Newell*, 891 F.2d

899, 13 U.S.P.Q.2d (BNA) 1248 (Fed. Cir. 1989). If the prior art fails to provide this necessary teaching, suggestion, or incentive supporting the Examiner's suggested modification, the rejection based upon this suggested modification is error and must be reversed. *In re Bond*, 910 F.2d 831, 15 U.S.P.Q.2d (BNA) 1566 (Fed. Cir. 1990).

The law is also clear that a claim in dependent form shall be construed to incorporate all the limitations of the claim to which it refers. 35 U.S.C. 112, fourth paragraph.

In the interests of expediting prosecution of the instant application, and without admission that any amendment is required, the Applicants have amended claim 39 to recite, among other things, a modular window well, comprising first and second wall members each having opposite side edges including attachment flanges for securing the first and second wall members to the foundation of a building, the first and second wall members having a central portion spaced horizontally from the side edges to form a central space, ***the first and second wall members being vertically stacked upon one another, wherein the attachment flanges of the first wall member include offset portions that overlap a portion of the attachment flanges of the second wall member, wherein when the first and second wall members are vertically stacked upon one another, at least a portion of an exterior surface of both of the attachment flanges of the first and second wall members are visible.***

In the interests of expediting prosecution of the instant application, and without admission that any amendment is required, the Applicants have amended claim 44 to recite, among other things, a window well member, comprising a sidewall having opposite side edges and a central portion extending from the opposite side edges to

define a central space, ***the sidewall including vertically extending attachment flange structure adjacent each opposite side edge for attachment to a building structure, the sidewall further including stop structures extending transversely relative to the flange structure adjacent each side edge, the stop structures configured to engage another substantially identical window well member nested within the window well member.***

In the interests of expediting prosecution of the instant application, and without admission that any amendment is required, the Applicants have amended claim 46 to recite, among other things, a window well structure, comprising a generally upright first wall having end portions, ***each end portion having attachment structure configured to attach the first wall to a building***, the first wall having a central portion extending from the end portions to define a central space, the first wall having an inner side facing the central space, and including upper and lower transversely extending webs forming a step, wherein the upper and lower webs are spaced apart to define a gap therebetween, a web extending transversely towards the central space and extending between and interconnecting the upper and lower webs to reinforce the step, ***and a substantially identical second wall being vertically stacked upon the first wall, wherein the attachment structure of the first wall includes an offset portion that overlaps a portion of the attachment structure of the second wall, wherein at least a portion of an exterior surface of both of the attachment structures of the first and second walls are visible.***

In the interests of expediting prosecution of the instant application, and without admission that any amendment is required, the Applicants have amended claim 51 to

recite, among other things, a modular window well, comprising first and second generally upright wall members, each having end portions configured to fit along a building foundation, and a central wall portion extending from the end portions to define a central space, ***wherein the first and second wall members are vertically juxtaposed with an upright portion of the first upright wall member overlapping the second wall member, wherein the end portions of the first and second wall members have a flange with a plurality of openings therethrough for connecting the first and second wall members to a building structure, wherein at least a portion of an exterior surface of the flanges of the first and second wall members are visible when the first and second wall members are vertically juxtaposed***, the overlapping portion of the first wall member including a boss having a cavity facing an upright portion of the second wall member, such that a fastener can be extended generally horizontally through the second wall member and into the boss to interconnect the first and second wall members.

Neither Kemp nor Bradley et al., either alone or in combination therewith, disclose or suggest any such structure of the present invention, as claimed in any of independent claims 39, 44, 46 or 51, or the claims dependent therefrom.

Specifically, Kemp or Bradley et al., either alone or in combination therewith, fail to disclose or suggest, among other things, that the exterior surface of the overlapping flange portions of both wall members are visible **when the wall members are vertically juxtaposed on top of one another**, as generally recited in the pending independent claims, as amended.

The Examiner acknowledged that Kemp is completely silent with respect to overlapping offset portions formed on the flanges. The recitation of Bradley et al. does not cure the deficiencies in the disclosure of Kemp. In fact, Bradley et al. appears to teach away from Kemp in that it discloses lateral (i.e., side by side) abutment, as opposed to stacking, along a side edge of the members to be joined, versus Kemp which discloses vertical stacking (i.e., one on top of another) along a wall edge of the members to be joined.

Furthermore, Bradley et al. discloses that the supposed “flange” members are fully recessed within sockets or cavities formed in the members to be joined, and thus no portion of the “flange” members are visible. This is completely contrary to requirements of Kemp, as well as the claimed invention, wherein the flanges need to be exposed so that fasteners can be driven through them and into a building structure, thus securing the walls thereto. In Bradley et al. there is no concern for exposing the “flange” members as the resulting structure is merely intended to be placed about an underwater support pile, i.e., the structure is not meant to be secured to any surface, but rather is spaced away from and surrounding the underwater support pile. That is, the “flange” members are not meant to secure the plastic jacket disclosed by Bradley et al. to any other structure whatsoever. More specifically, the fasteners driven through the fully recessed and concealed “flange” members merely secure adjacent laterally oriented, as opposed to vertically oriented, members together, and do not, can not, and are not intended to secure the members to a building structure, as presently claimed.

Thus, one of ordinary skill in the art would not look to Kemp and/or Bradley et al., either alone or in combination therewith, for guidance on a window well, as presently claimed.

Because claim 39 is allowable over Kemp and/or Bradley et al., either alone or in combination therewith, for at least the reasons stated above, claims 40, 41 and 43, which depend from and further define claim 39, are likewise allowable. Because claim 44 is allowable over Kemp and/or Bradley et al., either alone or in combination therewith, for at least the reasons stated above, claim 45, which depends from and further defines claim 44, is likewise allowable. Because claim 46 is allowable over Kemp and/or Bradley et al., either alone or in combination therewith, for at least the reasons stated above, claims 47-50, which depend from and further define claim 46, are likewise allowable. Because claim 51 is allowable over Kemp and/or Bradley et al., either alone or in combination therewith, for at least the reasons stated above, claim 55, which depends from and further defines claim 51, is likewise allowable.

Accordingly, the Applicants contend that the 35 U.S.C. 103(a) rejection of claims 39-41, 43-51, and 55 has been overcome.

### **35 USC §103(a) REJECTION**

Claim 52 stands rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,704,828 to Kemp in view of U.S. Patent No. 6,773,206 to Bradley et al. and further in view of U.S. Patent No. 6,484,455 to Poole

The Applicants respectfully traverse the 35 U.S.C. §103(a) rejection of claim 52.

As previously asserted, neither Kemp or Bradley et al., disclose any such structure of the present invention, as claimed in independent claim 51, or the claims dependent therefrom. The recitation of Poole does not cure the deficiencies in the disclosure of Kemp or Bradley et al.

Specifically, while Poole may arguably disclose "a web extending transversely towards the central space and extending between and interconnecting the upper and lower webs to reinforce the steps," which the Applicants do not concede, the fact remains that Poole fails to disclose or suggest, among other things, that the window well includes first and second wall members that are vertically juxtaposed on top of one another such that a portion of a flange of one wall member overlaps a portion of a flange of the other wall member, wherein at least a portion of an exterior surface of the flanges of the first and second wall members are visible when the first and second wall members are vertically juxtaposed, as generally recited in pending independent claim 51, as amended.

Thus, one of ordinary skill in the art would not look to Kemp, Bradley et al., and/or Poole, either alone or in combination therewith, for guidance on a window well, as presently claimed.

Because claim 51 is allowable over Kemp, Bradley et al., and/or Poole, either alone or in combination therewith, for at least the reasons stated above, claim 52, which depends from and further defines claim 51, is likewise allowable.

Accordingly, the Applicants contend that the 35 U.S.C. 103(a) rejection of claim 52 has been overcome.



**35 USC §103(a) REJECTION**

Claim 53 stands rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,704,828 to Kemp in view of U.S. Patent No. 6,773,206 to Bradley et al. and further in view of U.S. Patent No. 6,484,451 to Gavin

The Applicants respectfully traverse the 35 U.S.C. §103(a) rejection of claim 53.

As previously asserted, neither Kemp or Bradley et al., disclose any such structure of the present invention, as claimed in independent claim 51, or the claims dependent therefrom. The recitation of Gavin does not cure the deficiencies in the disclosure of Kemp or Bradley et al.

Specifically, while Gavin may arguably disclose “ribs interconnecting the upper and lower walls,” which the Applicants do not concede, the fact remains that Gavin fails to disclose or suggest, among other things, that the window well includes first and second wall members that are vertically juxtaposed on top of one another such that a portion of a flange of one wall member overlaps a portion of a flange of the other wall member, wherein at least a portion of an exterior surface of the flanges of the first and second wall members are visible when the first and second wall members are vertically juxtaposed, as generally recited in pending independent claim 51, as amended.

Thus, one of ordinary skill in the art would not look to Kemp, Bradley et al., and/or Gavin, either alone or in combination therewith, for guidance on a window well, as presently claimed.

Because claim 51 is allowable over Kemp, Bradley et al., and/or Gavin, either alone or in combination therewith, for at least the reasons stated above, claim 53, which depends from and further defines claim 51, is likewise allowable.

Accordingly, the Applicants contend that the 35 U.S.C. 103(a) rejection of claim 53 has been overcome.

### **35 USC §103(a) REJECTION**

Claims 42 and 56 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,704,828 to Kemp in view of U.S. Patent No. 6,773,206 to Bradley et al. as applied to claims 39 and 51, respectively, and further in view of U.S. Patent No. 6,484,455 to Poole.

The Applicants respectfully traverse the 35 U.S.C. §103(a) rejection of claims 42 and 56.

As previously asserted, neither Kemp or Bradley et al., disclose any such structure of the present invention, as claimed in any of independent claims 39 or 51, or the claims dependent therefrom. The recitation of Poole does not cure the deficiencies in the disclosure of Kemp or Bradley et al.

Specifically, while Poole may arguably disclose the use of “structural foam material for a window well,” which the Applicants do not concede, the fact remains that Poole fails to disclose or suggest, among other things, that the window well includes first and second wall members that are vertically juxtaposed on top of one another such that a portion of a flange of one wall member overlaps a portion of a flange of the other wall member, wherein at least a portion of an exterior surface of the flanges of the first and second wall members are visible when the first and second wall members are vertically juxtaposed, as generally recited in pending independent claims 39 and 51, as amended.

Thus, one of ordinary skill in the art would not look to Kemp, Bradley et al., and/or Poole, either alone or in combination therewith, for guidance on a window well, as presently claimed.

Because claim 39 is allowable over Kemp, Bradley et al., and/or Poole, either alone or in combination therewith, for at least the reasons stated above, claim 42, which depends from and further defines claim 39, is likewise allowable. Because claim 51 is allowable over Kemp, Bradley et al., and/or Poole, either alone or in combination therewith, for at least the reasons stated above, claim 56, which depends from and further defines claim 51, is likewise allowable.

Accordingly, the Applicants contend that the 35 U.S.C. 103(a) rejection of claims 42 and 56 has been overcome.

#### **ALLOWABLE SUBJECT MATTER**

Claims 1-20 are allowed.

#### **CONCLUSION**

In view of the foregoing, the Applicants respectfully request reconsideration and reexamination of the Application. The Applicants respectfully submit that each item raised by Examiner in the Final Office Action of May 22, 2006 has been successfully traversed, overcome or rendered moot by this response. The Applicants respectfully submit that each of the claims in this Application is in condition for allowance and such allowance is earnestly solicited.

The Examiner is invited to telephone the Applicants' undersigned attorney at (248) 723-0423 if any unresolved matters remain.

Any needed extension of time is hereby requested with the filing of this document.

The Commissioner is authorized to charge any additional fees or credit any overpayment to Deposit Account No. 08-2789.

**Respectfully submitted,**

**HOWARD & HOWARD ATTORNEYS, P.C.**

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**Date**

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